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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES, APPELLANT, v. MASON & HANGER CO. — No. 121.

THE UNITED STATES, APPELLANT, v. NORTHEASTERN CONSTRUCTION CO. — No. 122.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These are appeals by the United States from judgments of the Court of Claims awarding to the appellees amounts found to be due them under cost-plus contracts for the construction of certain buildings at Camp Zachary Taylor, near Louisville, Ky., and at Astoria, Long Island, respectively. The only point raised by the United States in this court is common to both cases and the facts, so far as they apply to the point raised, are identical.

The amount of the judgment in the Mason & Hanger case is $12,064.42. Of this amount $9,114.52 represents amounts paid by the contractor as premiums upon policies of public liability, automobile liability, burglary and hold-up insurance, taken out in connection with the work, and $450 is the amount of a premium paid by the contractor upon a bond given by one of its subcontractors. Upon this appeal the United States does not question the allowance of these amounts by the Court of Claims.

The balance—$2,500—represents the premium paid by the contractor upon a bond in the amount of $250,000 given by the contractor prior to commencing work under the contract, a bond required by the act of February 24, 1905 (33 Stat. 811, Comp. Stat., sec. 6923) to be given in such cases as a condition precedent to beginning the work under the contract. The United States claims that under the contract it is not required to reimburse the contractor for this item of expense.

The amount of the judgment in the Northeastern Construction Co. case is $150 and represents the premium paid by the contractor upon a similar bond in the sum of $15,000 under similar conditions.

THE MASON & HANGER CASE.

The contract in the Mason & Hanger case was signed between the contractor and the United States on June 20, 1917. Under this contract the contractor agreed to furnish labor and materials for the construction and completion of certain buildings and

utilities at Camp Zachary Taylor on the basis of cost, plus a fixed profit for the work done.

A copy of the contract is attached to the petition, marked "Exhibit A," and is set forth beginning at page 5.* The controversy arises out of the construction of Article II of this contract. Article II provides "that the contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items." Then follows 11 items which may be summarized briefly as:

(*a*) Labor, material, machinery, etc.

(*b*) All subcontracts made in accordance with the provisions of this agreement.

(*c*) Rental.

(*d*) Loading and unloading construction plant.

(*e*) Transportation.

(*f*) Salaries.

(*g*) Buildings and equipment.

(*h*) [The particular item herein involved and therefore quoted in full as follows:]

"Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the

* The page references are to the record in the Mason & Hanger case unless otherwise indicated.

written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fee, except as hereinafter provided." (P. 8.)

(*i*) Permit fees, deposits, royalties, etc.

(*j*) A proportion of transportation, traveling, and hotel expenses of officers, engineers, and other employees of the contractor.

(*k*) "Such other items as should in the opinion of the contracting officer be included in the cost of the work. When such an item is allowed by the contracting officer, it shall be specifically certified as being allowed under this paragraph."

[Paragraph "K" contains the further provision that "No overhead expenses of any kind, except as specifically listed above, shall be included in the cost of the work."]

Article IX of the contract is as follows (p. 13):

> *Bond.*—The contractor shall, prior to commencing the said work, furnish a bond, with sureties satisfactory to the contracting officer, in the sum of two hundred and fifty thousand ($250,000.00) dollars, conditioned upon its full and faithful performance of all the terms,

conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor.

Article XIV of the contract is as follows (p. 14):

> *Settlement of disputes.*—This contract shall be interpreted as a whole, and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provisions of Article IV hereof, the matter shall be referred to the officer in charge of cantonment construction for determination. If, however, the contractor shall feel aggrieved by the decision of the officer in charge of cantonment construction, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.

The third finding of fact made by the Court of Claims is as follows (p. 18):

> Before this contract, or any other contract for cantonments or other construction for war purposes, was signed, negotiations were entered into between the War Department and the various surety companies as to the premium to be charged on bonds, the Secretary of War having directed that such premiums should be treated as part of the cost of the work. As the result of these negotiations the

surety companies agreed to charge a premium of 1 per cent upon the penalty of the bond, their premium theretofore having been 2 per cent on the amount of work involved.

The War Department decided to fix the bond for the construction of each of the 16 cantonments for the National Army under the cost-plus system at $250,000. The contract of the plaintiff was to construct one of these contonments, and its bond was fixed at $250,000.

Colonel Littell, in charge of cantonment construction, notified both the plaintiff and the contracting officer that the rate had been fixed at 1 per cent, and directed the constructing quartermaster to refuse to transmit any bond not conforming to the requirement of the War Department as to premium. The contractor furnished a bond with the Fidelity & Deposit Co. of Maryland as surety in the sum of $250,000, which bond was required and approved by the contracting officer; and in accordance with the arrangement which had been made by the surety company with the War Department the Fidelity & Deposit Co. of Maryland fixed the premium at 1 per cent, or $2,500, and the plaintiff paid the said sum to said surety company, and subsequently the said sum of $2,500 was paid to the plaintiff by the United States in August, 1917, as a part of the costs of the work. Five hundred or more of such payments were made by the United States to contractors who had cost-plus contracts with the United States.

> In January, 1920, in pursuance of a decision of the Comptroller of the Treasury that such premiums on surety bonds were not allowable under cost-plus contracts, said sum of $2,500 was deducted from a sum of money otherwise due the plaintiff, and it has not since been restored or paid to it.

Substantially the same finding was made in the Northeastern Construction Co. case (p. 14 of record in that case).

The able opinion of the Comptroller of the Treasury (26 Dec. Comp. Treas. 374), omitting the preliminary statement of facts and the quoted provisions of the contract, is printed as an appendix hereto.

THE NORTHEASTERN CONSTRUCTION CASE.

The contract in the Northeastern Construction Co. case was made on the 12th day of September, 1918. Under this contract the contractor agreed to furnish labor and materials for the construction and completion of certain barracks buildings at Astoria, Long Island. The form of the contract is the same as that in the Mason & Hanger case, and the provisions, in so far as they affect the question under consideration, are identical.

The opinion of the Court of Claims was given in the Mason & Hanger case and was adopted by that court in the Northeastern Construction Co. case. (Northeastern Construction Co. record, p. 14.) Chief Justice Campbell dissented in each case.

The claim made by the United States in each case is that the premium upon the bond given by the con-

tractor was not one of the items of cost which the United States was required by the contract to pay.

ARGUMENT.

These contracts were obviously drawn upon a form prepared with care for general use of the War Department in making war contracts. Apparently about 500 similar contracts were made, for the Court of Claims tells us that 500 or more similar payments were made. (Third finding, *supra.*) The language is not obscure, imperfect, ambiguous, or inartificial. Therefore there is no need to look beyond the language itself in order to ascertain and declare its meaning.

> *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 272.

"The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

> *United States* v. *Gleason*, 175 U. S. 588, 606.

The provision of the contract covering the items of the cost of the work for which the contractor would be reimbursed are contained in Article II, and in that article only. The article begins:

> Cost of the work.—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures *in the performance of said work* as may be *approved* or *ratified* by the contracting officer and *as are included in the following items.* (Italics ours.)

Then follow eleven paragraphs designated (*a*) to (*k*), inclusive. The opinion of the Court of Claims is inaccurate in stating that the "contract provides that the plaintiff shall be reimbursed for such of its actual net expenditures in the performance of the work as may be approved or ratified by the contracting officer" (p. 20). There was an additional requirement. They must be expenditures included in one of the items (*a*) to (*k*).

Every item of expenditure, therefore, for which the Government was to reimburse the contractor must comply with *all* of the following conditions:

(*a*) It must have been expended "in the performance of said work."

(*b*) It must have been approved or ratified by the contracting officer.

(*c*) It must be included in one of the items set forth in the subdivisions of Article II.

(a) The cost of the contract bond was not incurred "in the performance of the work."

It was incurred before the work began and as a condition precedent to the commencement of the work in accordance with the act of February 24, 1905 (33 Stat. 811; Comp. Stat. sec. 6923), which provides:

> That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be re-

> quired, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; * * *.

The United States was to pay for performing the work, not for qualifying the contractor. It was not to pay all the expenses incurred by the contractor in, about, or in connection with the work. It was not to pay salaries of executive officers, expenses of the contractor's main or regularly established branch offices, interest on capital or borrowed money, or general overhead (p. 8), but only "such" expenses "in the performance of the work" as were enumerated.

(b) The bond upon which this premium was paid was not "such" a bond "as the contracting officer may approve or require" within the meaning of the contract.

Item (*h*) already quoted in full begins:

> Such bonds, fire, liability, and other insurance as the contracting officer may approve or require.

This language implies the exercise of discretion by the contracting officer, and separates bonds and insurance policies into two classes; those which he might require or approve, and those which he might not require or approve. When read in connection

with the language in the first paragraph of Article II, "in the performance of the work," it would seem to be clear that the contracting parties foresaw that during the progress of the work it might become expedient or even necessary for the contractor to give or require bonds, or to take out insurance of various kinds, and if such bonds or insurance policies were required or approved by the contracting officer, they become part of the cost which the Government was to assume. If, however, the contractor saw fit to procure bonds or insurance policies, which, however reasonable or proper they might be, the contracting officer did not require or choose to approve, the expense must be borne by the contractor. The contracting officer had a discretion, and according to his way of exercising it the Government reimbursed or did not reimburse the contractor. The bond in question, however, was not of this kind. Neither the contractor nor the contracting officer had any choice in the matter. An act of Congress had taken away all discretion. That statute, not the will of the contracting officer, "required" the bond. A bond would have been necessary even though the contract had contained no provision for it. The Secretary of War fixed the amount of the bond and the contracting officer merely saw to it that the sureties were satisfactory. Article IX does not require that the bond should be approved by the contracting officer. It says merely that the "sureties" shall be "satisfactory to the contracting officer."

The finding of the Court of Claims that the bond was required and approved by the contracting officer is, therefore, immaterial.

The Comptroller of the Treasury says in his decision (26 Dec. Comp. Treas. 378), "The bond itself shows no approval or other action by the contracting officer such as would have been necessary as to a bond under item (*h*)."

(c) The bond was not included in one of the items set forth in the subdivisions of Article II of the contract.

In addition to being an expense incurred in the performance of the work and one which the contracting officer had discretion to approve or not, the expense must be one included in the items of Article II, designated (*a*) to (*k*), inclusive. The bond in question was given under Article IX. What has already been said becomes clearer when we examine the various subdivisions of Article II. They all relate to matters of costs incurred *during the actual performance of the work*. The language of paragraph (*h*) is:

> * * * Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been sustained, etc.

are made costs of the work.

The word "bonds" in connection with fire, liability, and other insurance followed by a provision making

such losses and expenses as were not compensated by insurance or "otherwise" part of the cost which the United States was to pay, shows clearly that the matter referred to in the subdivision was the matter of indemnity for losses and expenses which might be sustained during the completion of the contract.

The Government was to reimburse the contractor for losses and expenses if they resulted from causes other than his fault or neglect and were not compensated by insurance "or otherwise." Hence, indemnity against such losses was a matter of concern to the Government, and the desirability of obtaining bonds or other form of indemnity was a proper matter for the discretion of the contracting officer. The word "insurance" is the appropriate word to cover losses under insurance policies and the word "otherwise" would seem fairly to refer to losses covered by bonds; as, for instance, a bond given by some officer or employee of the company handling money for the pay roll or a bond required of some subcontractor or other person doing some portion of the work for the contractor. Looked at in this way, the provisions of paragraph (k) have a clear and reasonable meaning. But there is nothing in the language that suggests that the bond mentioned in Article IX was intended to be included as one of the expenditures in the performance of the work. That was a bond for the protection of the United States and of persons to whom the contractor might become indebted, and if it was forfeited it

would be through the fault or neglect of the contractor and in that aspect would be wholly foreign to the purposes clearly indicated by paragraph (*h*).

This reasoning is confirmed by a reading of Article VI of the contract (p. 11), by which the contractor agrees to do certain things, among them to:

> (*c*) Procure and thereafter maintain such insurance in such forms and in such amounts, and for such periods of time as the contracting officer may approve or require.

This was the indemnity which the contracting officer might "approve or require," for which the Government was to pay under item (*h*) of Article II.

So the cost of this bond was not included in one of the items of expense; it was not "required" by the contracting officer and his approval was immaterial; and it was not incurred in the performance of the work. It would seem, therefore, that it was not a valid charge against the United States.

But the Court of Claims has found that the Secretary of War directed that such premiums should be treated as part of the cost of the work, and 500 such items were paid by the War Department.

If the Secretary of War so directed, and the finding of the Court of Claims is, of course, conclusive, it seems strange that a matter of so much importance should not have been specifically mentioned in these contracts, and even if he did so direct, the rights and obligations of the parties are those and only those expressed in their carefully prepared contract. If,

in addition to "such" enumerated expenses incurred in the performance of the work as should be "approved" by the contracting officer, it was the wish of the Secretary of War that expenses incurred before the work began, and made by act of Congress, a condition precedent to beginning the work, should be paid by the United States, there would have been no difficulty whatever in expressing it. While setting forth minutely and clearly, and in much detail the other items of expense, this item is conspicuously omitted, and "the expression of one is the exclusion of another."

> "Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument."
>
> *Tucker* v. *Alexandroff*, 183 U. S. 424, 436, quoting Lord Denham in *Aspdin* v. *Austin*, 5 Q. B. 671, 684.

The fact that the War Department paid these premiums in the first instance of course shows that in the opinion of the officers of that department it was a proper charge, but their decision is not final or binding upon the United States.

If the meaning of the contract is "clear in the eye of the law, the error of the parties can not control its effect."

Phila., W. & B. R. Co. v. *Trimble*, 10 Wall. 367.

As a general rule, and on grounds of public policy, the Government can not be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where, by misconstruction of the law under which they have assumed to act, unauthorized payments are made. *Whiteside* v. *United States*, 93 U. S. 247, *Hawkins* v. *United States* 96 U. S. 689, and cases before cited. The question is not presented as between the Government and its officer, or between the officer and the recipient of such payments, but as between the Government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of action not authorized by law, resulting from an erroneous conclusion by the agent of the Government as to the legal effect of the particular statutory law under or in reference to which he is proceeding.

Wisconsin Central R. Co. v. *United States*, 164 U. S. 190, 210.

Article IV of the contract provided for monthly statements of the work, and if there were any items entering into such statements *upon which the contractor and the contracting officer could not agree*, the decision of the contracting officer as to such item should govern (p. 10). The statements so made and the payments made thereon were to be final and binding upon both parties except as provided in

Article XIV. Article XIV authorized the contractor to submit to the officer in charge of the construction division of the Army and the Secretary of War for determination decisions of the contracting officer deemed *prejudicial to the contractor* (p. 14). There is no express provision for a decision where the Government was found by the proper officer to be prejudiced by the decision of the contracting officer. These provisions relate only to matters about which there was a dispute, and there was no dispute here. The contractor wished to be reimbursed and the Army officers were willing that should be done.

The only protection which the Government had against erroneous decisions of the contracting officer resulting in unlawful payments to a contractor was that afforded, as in the present case, by the accounting officers of the Treasury. *Neither a contracting officer nor any other officer of the Government could deprive the Comptroller of the Treasury of his statutory power and duty to see that no money was paid from the Treasury except such as the United States was legally bound to pay.* Nor could any contract lawfully be made which would have that effect. Such is the reasoning of the comptroller in his opinion. If the contract, when properly interpreted, did not give the contractor the right to be reimbursed for the premium on this bond, it was the duty of the comptroller so to declare. That is the purpose for which his office exists. Neither he nor the courts can be deprived of their duty and power to decide questions of law arising

upon a written agreement, even though the Army officers, who are generally not learned in the law, may be willing to acquiesce in the payment.

Money can not be drawn from the Treasury of the United States by the simple process of unanimous consent or acquiescence. No contracting officer can make his determination of the legality of disbursements final and conclusive upon the accounting officers of the Treasury or upon the courts. If it were otherwise, the powers of the comptroller would, as he expresses it, "soon decline to merely verifying computations on vouchers," and the function of the court would be to enter judgment in accordance with the decisions of administrative officers.

The court is not unmindful of the fact that these cases and other claims arising under similar circumstances present a question of importance in the final adjustments and settlements growing out of the cost-plus system of contracts, under which a large part of the war work was done. Whether that system was economically sound or not, it was certainly tremendously expensive for the Government, and in many cases enormously and unconscionably profitable to the contractors. In finally settling the vast cost of the war, while the contractor is entitled to all that the Government agreed to pay, even in unconscionable cases to his pound of flesh, nevertheless it is respectfully submitted that the hundreds of millions of inevitable cost-plus liability should not be increased by one dollar not "nominated in the bond."

CONCLUSION.

The United States contends upon this appeal that the decision of the comptroller was right, and the judgments of the Court of Claims, in so far as they relate to the premium upon these bonds, should be reversed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
NOVEMBER, 1922.

APPENDIX.

OPINION OF THE COMPTROLLER OF THE TREASURY, RENDERED IN THE CASE OF THE NORTHEASTERN CONSTRUCTION CO., OMITTING THE PRELIMINARY STATEMENT OF FACTS AND THE QUOTATIONS FROM THE CONTRACT.

* * * * *

Article IV of the contract provided for monthly statements of the work upon which payments should be made and that "the statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof." Article XIV authorized the contractor to submit to the officer in charge of the construction division of the Army and the Secretary of War, respectively, for determination, decisions of the contracting officer the contractor deemed prejudicial to it. There was no express provision for a decision where the Government was found by the proper examining officers to be prejudiced by the decision of the contracting officer.

During the progress of the work the contractor was reimbursed $150 premium paid on the bond required by Article IX, but in the final statement of the account under the contract (voucher No. 44, June, 1919, accounts of Capt. Nathaniel Dain, Quartermaster Corps), the amount was charged back to the contractor in an item stated as follows:

> "Premium on indemnity bond reimbursed to contractor by constructing quartermaster, which expenditure is not a proper charge against the Government as per ruling of Comptroller of Treasury, dated May 28, 1919. Amount bond, $15,000—$150."

The voucher contained the customary certificate of the payee that the amount was correct, but across its face appeared a statement as follows:

> "We hereby certify that the above statement represents all outstanding obligations under this contract to the best of our knowledge and belief without admitting that the balance of fee as shown is final; also claim will be made for reimbursement to us of the premium of $150 on surety bond."

What is the effect of this general statement of not admitting the finality of the account, the purpose of the account being to make a final one, need not be determined here. The proper procedure should have been for the disbursing officer to make no payment if the payee declined to accept the final statement of the account and claim could then have been filed with the auditor where the account would have been settled, including the premium item. However, the specific reservation of the premium item excepted it from the finality of the account. *Wm. Cramp & Sons* v. *United States*, 216 U. S. 494.

The purpose of Article II of the contract must have been that the contractor should be reimbursed for those items only that are within the provisions of that article and that items not therein provided for are excluded from reimbursement. It must be understood as definitely setting out the items for reimbursement so that reimbursements should not be

matters of interpretation under the general terms of the contract.

In no one of the respective lettered items of Article II is the cost of the bond under Article IX specifically named. Making the purpose of Article II as intending to definitely name the reimbursable items the omission to specifically name an item elsewhere expressly required is significant.

It is urged that the bond required by Article IX is within item (*h*) of Article II as a bond to be approved or required by the contracting officer, and that in fact it is the surety bond which is within its provisions; also that under the stipulations of Articles IV and XIV of the contract the payment of the premium was for the contracting officer to decide and his decision was final and conclusive upon all.

It is clear that the bonds which item (*h*) of Article II required should be a part of the cost of the work must be of the character described in that item and that the bond for performance of the contract stipulated for by Article IX is not of that character. It is a bond necessary to make the contract effective and not one as to which the contracting officer had any discretion. It was not a bond to be approved or required by the contracting officer, but only the sureties were to be satisfactory to him. The bond itself shows no approval or other action by the contracting officer such as would have been necessary as to a bond under item (*h*). The ordinary reading of this item as to what the contracting officer "may approve or require" limits it to the words immediately in context, "other insurance," but whether so limited or connected with the bonds and other forms of insurance there mentioned, its terms do not bring within its provisions the bond stipulated for by Arti-

cle IX. The various other items stipulated for under Article II as cost of the work are not such as embrace the cost of the bond referred to.

It is to be noted that Article XIV requires the bond to be given "prior to commencing the said work," while Article II refers to reimbursement for expenditures "in the performance of said work."

Whether the cost of the bond is to be allowed is a question for the determination of this office under its general authority to determine the amount due upon a claim and no stipulations of the contract, such as appear in Article IV for monthly statements of the work upon which payments shall be made and their finality, can deny to the accounting officers of the Treasury their statutory right to determine the legality of a payment with respect to the use of an appropriation. I construe such provisions of a contract as not intending any such purpose, but as relating wholly to the administrative officers of the executive department making the contract, and whatever is final and binding under such terms is as to those administrative officers and not as to the accounting officers of the Treasury. No branch of the Government can legally deprive, nor should its action be interpreted as intending to deprive, another branch of the Government of its statutory powers. At any rate I think it clear that a contracting officer can not legally contract for a determination of the legality of disbursements and make such a determination final and conclusive upon the accounting officers of the Treasury.

Such contract provisions at best can operate only upon such things as are within the contract and not as making legal interpretations, which are for the law officers of the Government or the courts. If the

contrary maintained, the statutory powers of the accounting officers of the Treasury would soon decline to merely verifying computations on vouchers.

This office has heretofore ruled, 25 Comp. Dec. 300, that every expense incurred by a contractor is not necessarily a cost of the work under a contract and that the premium on a bond for the performance of a contract is not in itself such a cost.

There are no facts in the present case which make this bond properly an expense to be paid by the United States, and as stated no term of the contract can be construed as imposing that liability.

The action of the auditor is affirmed.

○